"As regards the deceased cyclist, it is not possible to ascertain from the sketch plan the manner in which he was travelling shortly before the collison. But the driver has stated in his police report that the deceased cyclist was riding in a zig-zag manner in the middle of the road. Even if this was so, he could not have been across the centre line in the wrong half of the road for the brake marks FG would suggest that at the time of the collision the cyclist was still in his own half of the road but fairly close to the centre. From the facts thus inferred and admitted by the driver it is therefore possible to consider the question of liability. The car was travelling on a straight road with its headlights on astride the centre line of the road. There was no suggestion of any other traffic present on the road at the time. There was, therefore, nothing to prevent the driver from seeing at some considerable distance ahead of him an object such as a bicycle, with or without light, which might be on the road. As it happened here, the collison occurred because the driver was unable to take any avoiding action. The clear inference is that he did not see the cyclist until it was too late. Some explanation must be forthcoming from the driver as to why he was unable to take avoiding action. His headlights were bright, the road was about 20 feet wide, there was no other traffic and his car was being driven at about 50 miles per hour. Taking the view, as I do, of the sketch plan and of the damage to the car, it must be held that a *prima facie* case of negligence has been made out against the driver."

The crux of that case was that the motorist had ample warning to take proper precautions. As Ong C.J. put it at page 99 of the report,

"Having reached this result, I must proceed to consider the share of blame which should be attached to each party for contributing to the accident. From a distance of 80 yards the cyclist had been riding in a zig-zag manner on his wrong side of the road. The respondent driver should then have taken proper precautions against any cyclist not keeping his machine under control. Besides evasive action he should have slowed down immediately. Had his speed been reduced the deceased should have crossed over in safety. For this reason it is impossible to absolve the respondent driver from blame. In my opinion he was four-fifths responsible for the accident, while the deceased himself was only one-fifth to blame."

In the instant case what warning did the bus driver have of a motor-cyclist getting into his path? At the end of his cross-examination the Plaintiff admitted, "I saw the bus only when I was very near it because there was a corner and it was raining heavily." The bus driver in cross-examination said,

"The motor-cyclist skidded as he was coming out from the corner. He was riding the motor-cycle with one hand on his forehead and another on the handle (demonstrates). When I first saw him riding in this manner, he was only 10 feet away from me. I had not applied my brakes yet.

I did not apply my brakes because he was then on the left edge of the road. At that time the motor cycle was moving. I did not notice it wobbling. The front tyre was on the grass and the rear tyre was still on the main road. When I referred to left edge of the road, I meant my left side of the road. This is as one travels from Kuantan to Jabor. From that position the motor-cyclist turned back to his correct side of the road.

I did not apply my brakes when I first saw the motor-cyclist on the left edge of the road. I did not try to turn to my right. I carried on driving on my side of the road. When I saw the motor-cyclist attempt to return to his correct side of the road, I also attempted to turn to the left to avoid him.

The motor-cyclist fell down in front of me about 5 feet away. I first applied my brakes when the motor-cyclist fell down on the road. The motorcycle fell right in front of my bus – in the centre of my correct side of the road."

While the bus driver did not have anything like the time that the motorist in *Joginder Kaur's case* had, to avoid the accident, it was not the act of a prudent driver for the bus driver not to anticipate the motor-cyclist losing control of his machine. When he came round the bend and saw the motor-cyclist on his wrong side of the road albeit at the edge of the road riding with one hand to his forehead, in heavy rain, he should have considerably slowed down the bus and should have given the widest berth possible to the motor-cyclist both of which elementary precautions he did not take until it was too late.

If the bus driver's testimony was that he did not take those precautions because he was not given the opportunity to do so in that he was too close to the motor-cyclist when he first saw him, then he should be completely exculpated. However, as has been seen, the bus driver's testimony is that he did not take any evasive action when he first saw the motor-cyclist because "he was then on the left edge of the road."

Accordingly I am of the view that although the Plaintiff was substantially responsible for his injuries there was a measure of contribution in negligence on the part of the driver of the bus.

Lord Reid said in *Stapley* v. *Gypsum Mines Ltd.*[3]

"A court must deal broadly with the problem of apportionment, and, in considering what is just and equitable, must have regard to the blameworthiness of each party, but "the claimant's share in the responsibility for the damage" cannot, I think, be assessed without considering the relative importance of his acts in causing the damage apart from his blameworthiness."

In my judgment the Plaintiff/Appellant was 80% to blame for the accident and the driver of the motor bus 20%.

I would accordingly allow the appeal. The order of the President is set aside and substituted with an order that the Defendant/ Respondent pay to the Plaintiff/Appellant 20% of $16,045.00 being the agreed amount of damages at 100%.

The parties had not indicated what part, if any, of the agreed amount was for loss of future earnings and the solution to awarding interest on the judgment amount is to award 8% interest thereon from the May 27, day of August, 1980, being the date of the decision of the lower court and I so order. The Plaintiff/Appellant shall also be entitled to the costs in the court below and of this appeal.

Appeal allowed.

Solicitors: *Mahindar & Co.; Khoo & Sidhu.*

SYED ABU BAKAR BIN AHMAD v. PUBLIC PROSECUTOR

[O.Cr. J. (Seah J.) September 1, 1981]
[Kuching – Criminal Application No. Kg. 2 of 1981]

Criminal Law and Procedure – Documents – Whether defence entitled to inspect documents in custody of prosecution.

The accused applied for an order to inspect and make copies of all documents in the possession of the prosecution in connection with the trial and account books, receipt books, vouchers, bank statements, correspondence set out in the exhibit marked "A" and for other relief as the court deemed necessary. The accused contended that without a reasonable opportunity of studying the documentary material aforesaid the accused would not be able to pre-

pare his defence adequately or give full and accurate instructions to his counsel in the conduct of his defence.

Held, dismissing the application: when any document of a complicated nature is tendered in evidence, if the defence want time to study it, they can always apply to the court for extra time and if need be, to stand down cross-examination to a later date.

Cases referred to

(1) *Anthony Gomez* v. *Ketua Polis Daerah, Kuantan* [1977] 2 M.L.J. 24
(2) *Khoo Siew Bee & Anor.* v. *Ketua Polis, Kuala Lumpur* [1979] 2 M.L.J. 49
(3) *Haji Abdul Ghani bin Ishak* v. *Public Prosecutor* [1980] 2 M.L.J. 196
(4) *B.A.Rao & Ors.* v. *Sapuran Kaur & Anor.* [1978] 2 M.L.J. 146
(5) *Krishna Dayal* v. *Emperor* A.I.R. 1946 All. 227

CRIMINAL APPLICATION.

Edgar Joseph Jr. (*Lee Chuan Eng* with him) for the respondent.

Shaikh Daud bin Haji Mohamed Ismail (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Seah J.: By this Notice of Motion, as amended, the accused is asking for an Order that the Public Prosecutor do allow the defence an opportunity to inspect and make copies of:–

(1) all or any documents seized by the National Bureau of Investigation or in their possession in connection with this criminal trial;
(2) account books, receipt books, vouchers, bank statements, files, letters and other writings and documents set forth in the exhibit marked "A" referred to in the affidavit of the accused affirmed on August 13, 1981 filed in support hereof; and
(3) for such further or other relief as this Honourable Court deems fit.

The ground on which this application is made is substantially that without a reasonable opportunity of studying the documentary material aforesaid the accused will not be able to prepare his defence adequately or give full and accurate instructions to his Counsel in the conduct of his defence in this criminal trial.

This application is opposed by Senior Federal Counsel Encik Shaikh Daud. Mr. Edgar Joseph Jr. is appearing as leading counsel for the defence and he is assisted by Mr. C.E. Lee.

In *Anthony Gomez* v. *Ketua Polis Daerah Kuantan*(1) the appellant was charged with the offence of criminal intimidation by threatening one V. Bernard Vas. The appellant's solicitor applied for a copy of the first information report made by Mr. Vas but this was refused. The appellant thereupon applied for an Order pursuant to section 44 of the Specific Relief Act that the OCPD supply a certified copy of the report to the appellant. The application was dismissed by the High Court and the appellant appealed to the Federal Court.

Held, allowing the appeal (Suffian L.P. Raja Azlan Shah and Wan Suleiman F.JJ.): although section 76 of the Criminal Procedure Code is silent as to the right of a person to inspect a first information report, it is clear that under the common law the appellant has that right as he is a person interested in it and inspection is necessary for the protection of his interest. The first information report is admissible in evidence in the criminal trial under section 57 of the Evidence Act and therefore the appellant or his counsel should be supplied with a copy.

Some two years later, in the case of *Khoo Siew Bee & Anor* v. *Ketua Polis, Kuala Lumpur*(2) the headnote reads:

"The applicants had been jointly charged with an offence under the Dangerous Drugs Ordinance 1952. Before being charged each of them had made cautioned statements to the Police under section 113 of the Criminal Procedure Code. Counsel for the applicants applied to the President Sessions Court for a certified copy of the cautioned statements but the learned President made no order and advised the applicants to apply to the High Court for a ruling. Subsequently their counsel wrote to the respondent, the Ketua Polis, Kuala Lumpur asking for copies of the cautioned statements but the respondent refused to supply the copies. The applicants then applied for an Order pursuant to section 44(1) of the Specific Relief Act 1950 that the respondent supply them with copies of the cautioned statement.

Held (by Suffian L.P. sitting as a judge in the High Court) (1) the police officer who recorded the cautioned statements was under a duty to record them and therefore they were public documents;

(2) the accused has an interest in the cautioned statements recorded from him and has the right to inspect it and to a certified copy before the commencement of the trial;

(3) there should therefore be an Order that the respondent supply the applicants a certified copy of the cautioned statements made by each of them to the Police under section 113 of the Criminal Procedure Code on payment of such fees as may be payable."

In the case of *Haji Abdul Ghani bin Ishak* v. *Public Prosecutor*(3) the applicant had been charged with the offence of committing corrupt practice and an application was made that the Public Prosecutor (1) furnish him with copies of statements made by him whether cautioned or uncautioned; (2) furnish him with copies of similar statements made by his co-accused and (3) offer him the apportunity to inspect and make photostat copies of the documents seized by the National Bureau of Investigations in connection with the trial.

Held by Wan Yahya J.: (1) as the statements made by the applicant, whether cautioned or uncautioned, were public documents and the applicant had a tangible interest in them, the applicant was entitled to be supplied with copies of the documents; (2) the applicant was not entitled to copies of the statements of his co-accused, as the co-accused was a competent witness against him. However, he might by a similar application obtain them for his own defence; (3) the applicant was entitled to inspect the documents seized by the NBI and to make copies of them.

In reaching (3) it seems to me that Wan Yahya J. relied on the provisions of section 51 of the Criminal Procedure Code. In my opinion, this section ought to be construed strictly. It does not allow an accused to ask for discovery of documents or inspection of documents seized by the Police in the course of their investigation or in their possession before the criminal trial. To do so would be tantamount to inspection of the evidence of the prosecution by the defence prior to the trial. I regret I am unable to agree with the learned judge if the order meant that the defence is entitled to inspect the documents seized by the police or in their possession before the criminal trial.

Reliance has also been placed on the case of *B.A. Rao & Ors* v. *Sapuran Kaur & Anor*[4] With respect, the Federal Court was dealing with a civil action for damages for negligence and that case is therefore distinguishable from the present.

Reference has also been made to the case of *Krishna Dayal* v. *Emperor*[5], where counsel for the defence read the following passage:

"Criminal trial–inspection of documents – refusal on ground that they were not referred to by prosecution is bad–accused must be given wider scope."

The next line reads: Admissibility of a document is the rule and not the exception.

It is further stated that "Every document, particularly in a criminal trial, must be admitted in evidence to throw light on the obscure corners of the case. That light should always be welcome, unless its entry in the court is shut out for very special reasons, because the object of a trial in every case is to ascertain the truth in respect or the charge made. Hence, denial of an opportunity to inspect documents because they were not referred to by Crown counsel is wrong. A cross-examining counsel is entitled to cover a much wider field and refer to many more documents than the counsel who has conducted the examination-in-chief, if for nothing else, to test the veracity of the witness."

If one were to examine the judgment of Sinha J. closely, it is quite plain that the learned judge there was concerned with the question of admissibility of evidence tendered by the prosecution. In my opinion, this case is no authority for the proposition that an order for inspection of documents in the custody of the prosecution should be granted before the criminal trial. In my view, when any document of a complicated nature is tendered in evidence, if the defence want time to study it, they can always apply to the court for extra time and if need be, to stand down cross-examination to a later time.

For the above reasons, I disallow the application.

Application disallowed.

Solicitors: *Ee & Lim*

LEE BAN HOO & ANOR. v. S. VEERIAH & ANOR.

[O.C.J. (George J.) September 30, 1981]
[Kuantan – Civil Suit No. 65 of 1980]

Damages – Fatal road accident – Deceased motorcyclist partly negligent – Quantum.

Torts – Motor accident – Liability of bus driver overtaking motorcyclist – Death – Damages – Civil Law Act 1956, s. 8.

A 35 year old female motorcyclist, wife of PW2, died as a result of injuries sustained by her in a road accident between her motorcycle and a bus driven by the second defendant. The facts revealed that the deceased was probably about 6 feet from the left edge of the road making it necessary for the lorry to go over the centre line in trying to overtake her. There was an oncoming car and the lorry driver in hurrying to get back to his lane caused the near left of the lorry to hit the deceased.

Held: (1) the motorcyclist was herself negligent in not having anticipated that with the heavy traffic on both motor lanes there was every possibility that the motor lorry that was overtaking her would have had to swerve back into its own lane. A prudent motorcyclist would have moved nearer the left edge of the road when the motor lorry proceeded to encroach beyond the centre white line in overtaking her;

(2) the driver of the motor lorry was 70% to blame for the accident and the deceased motorcyclist 30% to blame;

(3) the plaintiffs were awarded: damages in the sum of $2,800 (70% of $4,000) under section 8 of the Civil Law Act and agreed special damages, 70% of $1,156 and interest; 70% of $7,200 for loss of dependency at $200 a month for 3 years from the date of death of the deceased to the date of judgment plus interest and 70% of $22,500 for loss of dependency for a further period of 13 years with interest.

CIVIL SUIT.

Balendran Shah for the plaintiffs.

S.B. Veloo for the defendants.

George J.: On July 10, 1978 Leong Ah Moi the wife of PW2 died as a result of injuries sustained by her in a road accident that occurred at about 1.45 p.m. on that day at or near the junction of Jalan Besar and Jalan Penjara, Kuantan.

The second named defendant who gave evidence as DW1 testified that at about 1.45 p.m. on July 10, 1978 he was travelling towards Kuantan driving motor lorry WC 9929 with its right wheels about a foot from the centre white line of the road when both he and his attendant heard a sound suggesting that something had collided with the rear of the lorry. He stopped the lorry and on alighting from it noticed that a motor-cyclist was lying dead on the road at his rear.

DW1 insisted that he had not overtaken or tried to overtake the motor-cyclist. He went on to explain that as there was heavy traffic it was not possible to overtake a motorcycle at that point.

Now according to particulars appearing in the sketch plan and its key which were agreed documents, the width of the motor lorry was 7 feet 6 inches and the width of the road F-C was 28 feet made up of two lanes of 14 feet each. On each side of the road was a 6 to 7 feet wide bicycle track for cyclists and pedestrians. These bicycle tracks were at the same level and an extension of the metalled motor road.

I find that I cannot accept DW1's contention that the question of overtaking a motor-cyclist at that point in the road simply could not arise because of heavy traffic from the opposite side. A motor lorry, having a width of 7 feet 6 inches, travelling a foot from the centre white line, would allow a 5 feet 6 inches passage between the lorry and the left edge of the road sufficient to allow the lorry to safely overtake a motor-cyclist travelling say 2 feet from the left edge of the motor lane.

But clearly to try and overtake a motor-cyclist who was riding more than 3 or 4 feet from the left edge of the road when there was oncoming traffic on the opposite lane would have been dangerous.

The witness Tang Kum Mun PW1 testified that the motor lorry overtook him when he was riding his motorcycle 3 to 4 feet from the left edge of the motor lane. He went on to say that the motor lorry went on to try to overtake another motor-cyclist also proceeding towards Kuantan travelling as PW1 did, about 3 feet from the left edge of the motor lane. The lorry in trying to overtake the